80-475

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. . . .

IN THE

Supreme Court of the United States

October Term, 1980

In the Matter of

SPRINGPARK ASSOCIATES, a Limited Partnership,

Debtor/Petitioner.

CROWN LIFE INSURANCE CO.,

Plaintiff/Respondent,

vs.

SPRINGPARK ASSOCIATES, a Limited Partnership,

Defendant/Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Defendant/Petitioner,

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on July 25, 1980.

Questions Presented for Review.

1. Can a valid agreement be made in a prior bankruptcy proceeding, *dismissed without prejudice*, that a party shall not file for subsequent relief under the Bankruptcy Act?

2. Should equity countenance a windfall of approximately $500,000 to respondent CROWN at the expense of the financially troubled debtor/petitioner where CROWN was not at risk of loss?

3. Does the decision of the Bankruptcy Judge issued under date of January 11, 1977, that he would limit argument "* * * only to why the debtor should not be bound by an agreement that was entered into in a previous Chapter XII", require the performance of an act by the debtor in violation of the Offenses Section of the United States Code (Title 18, U.S.C., §152 (5th paragraph))?

4. Should the Court resolve the conflict between the principles enunciated in the Second Circuit case *In Re United States Realty* (153 F.2d 853 (2nd Cir. 1946) and the decision of the Ninth Circuit in the instant case?

Parties.

All parties are listed in the caption of the case.

Official and Unofficial Reports on Opinions Delivered in Courts Below.

In the Matter of: Springpark Associates, 623 F.2d 1377 (9th Cir. 1980).

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Jurisdiction of This Court.

(i) The date of the judgment or decree sought to be reviewed is July 25, 1980 and the time of its entry is July 25, 1980.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C., Sec. 1254(1).

Statement of the Case.

Petitioner is a limited partnership, which in 1977 was the owner of a 32-unit apartment complex in the City of Los Angeles. The limited partnership is made up of thirteen (13) individual investors who put up "front money" in the sum of approximately $500,000 for construction of the apartment complex. The general partner, a former professor at the University of Southern California, and his wife, a retired school teacher, invested substantially all of their savings in the limited partnership.

Crown Life Insurance Company, a Canadian insurance company, licensed to do business in the State of California, acquired a construction loan originally made by Sutro Mortgage Investment Trust to the limited partnership for construction of the apartment complex on which was advanced approximately $650,000.

The petitioner was *never* in default of payment of the principal and interest of Crown Life Insurance Company at the time of the filing of the first proceeding *or at the time of the filing of the second proceeding*. Petitioner was in default, however, of taxes of approximately $35,000 at the time of the filing of the first proceeding, and in the sum of approximately $75,000 at the time of the filing of the second proceeding.

The petitioner filed a petition under Chapter XII of the Bankruptcy Act on February 11, 1976 (first proceeding).

An adversary proceeding was commenced by respondent in that proceeding to lift the automatic stay provided by Rules of Bankruptcy Procedure 12-43(a). During the course of that trial, an agreement was reached which was approved by the Court under date of August 12, 1976, whereby CROWN granted a 60-day period of forbearance in which it agreed to accept a payoff of its entire indebtedness, and petitioner dismissed the proceeding. It was further agreed by that agreement that if such payoff was not accomplished, CROWN would be free to proceed to foreclosure by trustee's sale. Pursuant to the said agreement, the first Chapter XII proceeding was dismissed; *no mention being made as to whether it was with or without prejudice*. Rules 120(c) and 12-41(d) of the Rules of Bankruptcy Procedure state that if the dismissal does not make mention thereof, then the dismissal is deemed without prejudice.

Petitioner did not make the deadline for payoff and a series of one week extensions were granted by CROWN of the deadline period, notwithstanding requests by petitioner for a 30-day extension to make the debtor's attempts to obtain refinancing more palatable to lenders. Upon refusal of further extension, petitioner filed a second Chapter XII proceeding on December 30, 1976. At the time of the second filing, petitioner *was not in default of payment of any interest or principal on CROWN'S indebtedness*. Petitioner was in default of approximately $75,000 in back taxes for all of 1974, 1975 and 1976, which under California law would result in loss of the property to tax sale if such default continued for a period of five (5) years. (Section 3511 California Revenue & Taxation Code). At the time of the filing of the second petition, approximately two (2) years remained before a tax sale could proceed.

On the same day the second petition was filed, CROWN, having been advised of the proposed filing by Petitioner,

filed a complaint under Rule 12-43(e) of the Rules of Bankruptcy Procedure, *ex parte* to lift the stay. Petitioner appeared before the Judge on two (2) hours telephone notice and the Court continued the matter over the New Year holiday to January 3, 1977. The Court refused to afford the Petitioner the opportunity to answer or to offer any evidence as to the value of the property (upon which a finding of equity would have to be based) and as well refused to accept testimony concerning a loan commitment obtained from a local savings and loan association *subsequent to the dismissal of the first proceeding* and prior to the filing of the second proceeding, in a sum sufficient to pay CROWN in full including interest at ten percent (10%) per annum and attorneys fees. The refusal to accept testimony of value and of the new loan was imposed notwithstanding that both Petitioner and Respondent in the first proceeding agreed in the agreement of August 12, 1976 that the outcome of the then pending proceeding to lift stay and permit foreclosure (in which the question of "value" and "equity" were being tried) "would be uncertain". Thus at no time was the question of "value" ever determined.

The Bankruptcy Court rendered its opinion, in substance, on the ground that the Petitioner already had its day in court in the first proceeding and that the stipulated judgment was res judicata on the issue and on the further ground that there was no change in circumstances between the first filing and the second filing.

The District Court Judge ignored the Bankruptcy Judge's theory of res judicata and affirmed the Bankruptcy Court's finding of "serious harm" to the Respondent (District Court Opinion, p. 4, line 6), and further, *that the debtor could not circumvent the August 12, 1976 agreement and order by the filing of a second Petition.*

The 9th Circuit, in its opinion and affirmation filed July 25, 1980, based its decision on the ground that the Bankruptcy Court is a court of equity and that it should enforce a settlement agreement, notwithstanding that the agreement, according to the interpretation of the 9th Circuit, was an agreement that a second Petition would not be filed, (p. 5, line 19 of Opinion of 9th Circuit) (notwithstanding that the dismissal of the first Petition was "without prejudice").

Basis for Federal Jurisdiction in the Bankruptcy Court.

The jurisdiction of the Bankruptcy Court is had under the "Bankruptcy Act" of 1898 as amended, specifically 11 U.S.C. §11.

ARGUMENT.

1. Respecting Point 1 of Questions Presented for Review.

A reading of the decision of the Bankruptcy Judge, the District Judge, and the 9th Circuit indicates that the only matter in which they were in accord was the fact that the agreement in the first proceeding entered under date of August 12, 1976, prevented the Petitioner from seeking relief in a second Chapter XII proceeding.

Firstly, Petitioner was a debtor-in-possession in the Chapter XII proceeding. As such the debtor had all of the rights of a trustee in bankruptcy (§444 of the Bankruptcy Act; 11 U.S.C. §844). If the lower Courts' decisions are carried to their natural conclusion, then the agreement of August 12, 1976 in the first proceeding precluded a trustee in bankruptcy (in the event of adjudication) from asking for a further stay of foreclosure. This, obviously, is not the case, and the rights of a trustee in bankruptcy to ask for time is a time honored principle followed by the courts. (Rules of Bankruptcy Procedure 12-43(b) and Comment, Paragraph 3).

CROWN could have effectively prevented the filing of the second petition by requiring that the first proceeding be dismissed "with prejudice". CROWN neglected to protect itself in this respect. Plans of arrangement, remedies, and recoveries, or lack of recoveries, have traditionally been structured around technical mistakes and inadvertent acts by parties and the courts have never been offended thereby. CROWN never asked the equity side of this Court to impose a provision in the agreement accomplished in the first proceeding that the dismissal was *"with prejudice"*. Certainly, Crown Life Insurance Company cannot appropriately stand before this Court at the present time with hat in hand in the posture of Job begging for his bread because its lawyers

failed to protect them. CROWN is not the proverbial widow being put out into the cold on losing her home. CROWN made its bed, and it is respectfully submitted, should not be the subject of pity or concern by this Court.

The investors, including the general partner and his wife who have their entire savings at stake more appropriately stand in that position.

2. Respecting Point 2 of Questions Presented for Review.

The Court will take judicial notice of the fact that the usual business of an insurance company is the lending of its policyholders' premiums to approved borrowers, which loans are generally approved by statute. The substance of its business is the receipt of interest from borrowers, which interest rate stands the competition of the open market, and not receiving windfalls as in the instant case.

The Court's refusal to accept testimony or evidence concerning the value of the property and, therefore, "equity" in the property, *precluded* the Court from considering whether or not Crown Life Insurance Company would be damaged or risk exposure because of a continued stay of enforcement of its lien. The offer of testimony and proof by Petitioner, that subsequent to the first filing and prior to the second petition, Petitioner had obtained a loan commitment from and approval of the loan committee of a lending institution, precluded the Court from determining whether or not there was any exposure on the part of CROWN to any loss. The Petitioner offered testimony and evidence that the property was worth approximately $1,-200,000, which means approximately $500,000 in excess of the amount of the loan to CROWN. On the other side of the coin, the parties seeking relief of this Court are the individual investors, including the general partner and his

wife who had invested substantially all of their life savings in the venture and who by the Bankruptcy Court's action will be wiped out, while CROWN accepts the windfall of approximately $500,000 in equity in the property.

Under the foregoing circumstances, it is respectfully submitted that the Bankruptcy Court did depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

3. Respecting Point 3 of Questions Presented for Review.

There is a surprising and somewhat unique result that derives from an analysis of the decisions of the Circuit Court, the District Judge and the Bankruptcy Judge. Each of the Courts have said either that their conscience was shocked, or that elements of fairness to CROWN required their decision, or that the parties once having agreed to settle, and the Court having placed its imprimatur thereon, that equity should enforce the agreement. Each of these Courts indicates that the Petitioner was "bound" by the agreement accomplished in the first proceeding under date of August 12, 1976. Each of these Courts, therefore, decree, or at least imply, that the Petitioner was bound to perform. However, if this is the interpretation of the Court, then the debtor had agreed for a consideration (extension of time to foreclose) not to avail itself of a remedy afforded by the Bankruptcy Act, an offense under 18 U.S.C. §152, 5th Paragraph (Vol. 2A, Collier on Bankruptcy, 14th Ed., p. 1215, Note 9). In other words, the oft condemned pre-bankruptcy agreement not to avail oneself of bankruptcy relief was effectuated.

4. Respecting Point 4 of Questions Presented for Review.

The Second Circuit in *In Re United States Realty* (*supra*) had approved an agreement between a secured lender and

the debtor whereby time to foreclose was extended in return for the agreement of the debtor not to oppose foreclosure. Subsequently, the debtor, finding itself unable to meet the deadline, *in the same proceeding*, applied for a further extension and the Court granted it. Judge Frank of the Second Circuit at page 855, stated as follows:

> "*The agreements between the bank and the Trustee must be sharply differentiated from trustee's certificates which, issued for new and substantial consideration, must always be strictly enforced.* Because the pledged asset constituted an essential ingredient of any reorganization, the original entry of the injunction order, as to the Bank, was amply justified. So, too, without the consent of the Bank, would have been its continuance for a reasonable period. In determining the length of that period, the large margin of security for the bank's debt (ensuring it against any probable loss for a considerable time) was of major importance. On the facts, there could be no abuse of discretion in continuing the injunction up to the present time, despite the Bank's objection. *The bank was thus in no position to exact a promise, such as that contained in the agreements, definitely limiting that period. For, in the circumstances, the bank was indulging in no 'forbearance'; it gave up nothing by the agreements except the stipulation of a reduced interest rate for the life of the agreements.*
>
> *Consequently, we think the Court was not obliged to enforce the terms of the trustee's agreements when it became obvious that to do so might seriously jeopardize reorganization through a plan then about to be considered.* Except frustration of the Bank's desire to avoid the court's summary jurisdiction (should the Trustee desire to sue it), the bank has suggested no harm to it which will result from the court's refusal to allow it to realize on its collateral. We think that the

court, when the agreement recently ended, properly kept the injunction alive, pending an exploration of current efforts to work out a plan." (Emphasis added). (Footnotes omitted).

The 9th Circuit, in this case, is directly contra in that it says that repudiation of the previously approved agreements will not be tolerated. It is respectfully urged that this Court should assume the supervision of this matter for the purpose of making a determination as to which Circuit is correct.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH BERNFELD,
a Member of Joseph Bernfeld,
a Professional Corporation,
Counsel for Petitioner.

APPENDIX (i).

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

In the Matter of: Springpark Associates, a Limited Partnership, Debtor-Appellant. Crown Life Insurance Co., Plaintiff-Appellee, vs. Springpark Associates, a Limited Partnership. No. 78-1739.

Filed Jul. 25 1980.

On Appeal from the United States District Court for the Central District of California* Before TUTTLE, WALLACE and NELSON, Circuit Judges. TUTTLE, Circuit Judge:

This is an appeal by a debtor from an order of a bankruptcy court, lifting an automatic stay which resulted in the sale of the debtor's property. The district court affirmed the judgment of the bankruptcy court. We also affirm the judgment.

In 1972, Springpark Associates (Springpark), a one-asset limited partnership, borrowed $650,000, securing the loan with a trust deed which was subsequently assigned to Crown Life Insurance Company (Crown). In November 1975, after the failure of Springpark to pay some real property taxes, Crown caused a notice of default and election to sell the trust property. In February 1976, Springpark filed a Chapter XII bankruptcy petition that had the effect of staying Crown's foreclosure sale. Crown filed an adversary complaint seeking to lift the stay.

At a May trial, one of Springpark's general parties represented that the partnership could arrange refinancing which would enable it to pay its debts to Crown without a

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*Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

foreclosure sale, but that the loan could not be obtained while Springpark was engaged in Chapter XII proceedings. The parties thereupon agreed upon a stipulation which said:

IT IS HEREBY ORDERED that:

1. The automatic stay issued pursuant to Rule 12-43, Rules of Bankruptcy Procedure, is hereby terminated, subject to the following conditions:

A. Plaintiff shall not commence advertising any Trustee's sale, pursuant to the power of sale provision of its Deed of Trust, prior to October 15, 1976.

B. Plaintiff shall not cause any such Trustee's sale to be scheduled for any date prior to November 5, 1976.

1. (sic) The rents, issues and profits of the property encumbered by Plaintiff's Trust Deed are sequestered effective February 26, 1976 subject to the following conditions:

A. The sequestered funds shall not include those funds necessary for the ordinary operating and maintenance expenses of the property.

B. The excess, if any, may be used by Debtor to pay any costs, not exceeding $12,000, incurred by the event that Defendant is able to sell or completely refinance the property prior to November 5, 1976, any such excess shall be paid over to Plaintiff.

C. In the event that Debtor is able to sell or completely refinance the property prior to November 5, 1976, Plaintiff shall not collect or demand any prepayment by reason of the pay-off of its loan incident to such sale or refinancing, provided that any such pay-off of Plaintiff's (sic) also include payment of Plaintiff's expenses, not exceeding $12,000 incident to foreclosure including any attorney's, witness and Trustee's fees.

By a separate order, the Court also granted Springpark's motion to dismiss the Chapter XII proceeding.

However, the refinancing never materialized and, after granting Springpark several extensions, Crown set December 30, 1976 as the final date for the foreclosure sale. Hours before the sale was to take place, Springpark filed a second Chapter XII petition, again invoking the portion of the Bankruptcy Rules that a petition stays other proceedings. Crown again sought relief from this stay.

In a January hearing, the bankruptcy court decided that it was bound by the August 12 stipulation. On January 11, it lifted the automatic stay and the property was sold. That order forms the basis of this appeal.

In its opinion, the district court found first that the sale of the property had not mooted the issue in this case because alternative remedies were available to aid the appellant should the court conclude that the bankruptcy court had erred. Turning to the merits, the court concluded, however, that the August 12 stipulation was binding on the parties and that therefore the bankruptcy court acted correctly.

In this Court, as an initial point the appellee argues again that this case is now moot because the property in question has been sold. This argument is similar to the question this Court addressed recently in *In re: Royal Properties, Inc.*, . . . F.2d . . . (9th Cir. 1980). In that case, this Court found that the issue there had been mooted because "the purchasers of the property have not been made parties to the appeal, and we cannot grant effective relief in their absence." *Id.* at .....

Here, however, Crown purchased the property at the foreclosure sale, so it would not be impossible for the Court to fashion some sort of relief. We therefore uphold the district court's judgment that this case is not moot.

Turning to the merits, the appellant argues essentially that the bankruptcy court had no right to lift the stay that was automatically imposed when Springpark filed the second Chapter XII petition. The appellant also urges that the bankruptcy court erred in proceeding under Rule 12-43(e)[1], since there was no proof of irreparable harm to Crown. Therefore, it urges, the Court should have proceeded under subsection (d) of the rule[2], affording Springpark an opportunity to file an answer and proof.

Like the district court, we find that the principal issue to be considered here is the effect to be accorded the August stipulation agreement. We find that the August 12 agreement should be enforced. As stated by this court in *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978):

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[1](e) *Ex Parte Relief from Stay*. On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without written or oral notice of the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

[2](d) *Relief from Stay*. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against the enforcement shall show that he is entitled thereto.

> . . . a litigant can no more repudiate a compromise agreement than he could disown any other binding contractual relationship. . . . Moreover, it is equally well settled in the usual litigation context that courts have inherent power summarily to enforce a settlement agreement with respect to an action pending before it; the actual merits of the controversy became inconsequential. . . . The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation. [Citations omitted.]

That rule seems applicable here, especially since a contrary result would tend to encourage delays similar to this one in future bankruptcy proceedings and discourage the use of settlements. We find that both sides were bound by the August 12 agreement and that Springpark thereby forfeited its right to file another petition when it failed to obtain refinancing. As the district court noted, quoting from In re Colonial Realty Investments Co., 516 F.2d 154, 160 (1st Cir. 1975), "the policy of Chapter XII is rooted in society's interest in substituting arrangement for liquidation when possible. . . ." The debtor here had its chance at avoiding liquidation, but chose instead to agree to an order setting a specific time when the property could be sold, if refinancing could not be obtained. It is now bound by that settlement and order.

As to Springpark's contention that the bankruptcy court should have afforded it a formal opportunity to answer, we note that the bankruptcy court did conduct an evidentiary hearing before granting relief from the stay.[3] But in any

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[3]Crown apparently applied for ex parte relief but the judge did conduct an evidentiary hearing more than a week before lifting the stay.

event, the bankruptcy court clearly had the power to lift the stay under Rule 12-43(f) which states:

> (f) *Availability of Other Relief.* Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Since a bankruptcy court is a court of equity, it clearly had the power to enforce a settlement agreement. In this case, the irreparable harm by permitting the stay to continue involved harm not only to the appellee, Crown, but to the judicial process itself, by permitting a settlement agreement not to be enforced. That harm certainly justified the action the bankruptcy court took.

We therefore affirm the judgment of the district court.

APPENDIX (ii)a.

Order Lifting Automatic Stay.

United States District Court Central District of California.

In the Matter of Springpark Associates, a Limited Partnership, Debtor, Crown Life Insurance Co., Plaintiff, vs. Springpark Associates, a Limited Partnership, Defendants. In Proceedings for a Real Property Arrangement—Chapter XII No. 76-16785 (BR).

Filed Jan 11 1977.

This matter is before the Court on plaintiff's Complaint filed December 30, 1976 to lift the automatic stay provided for in Rule 12-43 of the Rules of Bankruptcy Procedure.

A hearing was held January 3, 1977 limited to the issue of whether Springpark is bound by a stipulated judgment dated August 12, 1976, wherein Springpark agreed to the lifting of the stay.

This case is the second time that Springpark has sought the protection of the bankruptcy court within one year. The prior petition (76-01969) was filed on February 11, 1976 at which time Springpark was represented by James W. Baumgartner, Esquire. The present petition was filed on December 30, 1976 and Springpark is now represented by Joseph Bernfeld, Esquire.

Plaintiff, Crown Life Insurance Co., filed a Complaint in the prior proceedings for relief from the automatic stay and the trial was partially completed on the complaint. At the hearing on May 12, 1976, Mr. Dewing stated that he had a loan commitment that was 99% committed that would pay off everybody, but the lender did not want to make the loan while Springpark was in the Chapter XII proceedings.

Ultimately, the parties entered into a stipulated judgment (terminating the automatic stay) in which plaintiff agreed

to refrain from advertising any trustee's sale prior to October 15, 1976 and from conducting any sale prior to November 5, 1976. Plaintiff also agreed to waive any right it had to demand any prepayment penalty or restitution on prepayment by reason of the payoff of its loan incident to a sale or refinancing. Springpark's motion to dismiss the Chapter XII case was granted on August 31, 1976.

Springpark was unable to either sell or completely refinance the property prior to November 5, 1976 and although plaintiff was entitled to hold its foreclosure sale on November 5, 1976, the sale was scheduled for November 24, 1976. Upon representation by Mr. Dewing that there was still a lender who was prepared to refinance the property, plaintiff consented to and did continue the sale to December 7, December 15, December 22, and finally December 30, 1976.

The obvious purpose for both Chapter XII petitions was to prevent the foreclosure sales by Crown. The present petition was filed (without schedules or statement of affairs) two hours before the foreclosure sale was to be held.

Plaintiff has not only lived up to all its commitments under the stipulated judgment but it generously put off its sale at Mr. Dewing's request from November 24 to December 30. Plaintiff's generousity was repaid by the filing of another Chapter XII petition, two hours before the sale on December 30, again for the stay provided for by Rule 12-43.

Springpark has one asset, a 32 unit apartment building located at 6770 Spring Park Avenue, Los Angeles, California, which is approximately 2½ years old. There is a first trust deed owing on the property in favor of Crown Life Insurance with Ralph C. Sutro Co. as servicing agent for approximately $630,000.

Crown's lien on the property is subordinated to a constantly increasing sum due and owing as real estate taxes and penalties. Springpark has been in default on its property taxes since December 1974 presently owing $75,000.

The financial situation, including the state of Crown's security is worse now than it was in February 1976 when the first petition was filed, since two more $15,000 tax installments have become due and remain unpaid. In fact, the income from the property has never been sufficient to pay its expenses, including the first trust deed payments and taxes.

The general partner of Springpark, Mr. Dewing (the person signing both Chapter XII petitions), is himself the subject of a bankruptcy proceeding presently pending before this court. Within the last three years Mr. Dewing has been involved in at least four other Chapter cases in this District in which he was either a general partner or a stock-holder and officer of a corporate general partner.

Although the property has been fully occupied since February 1976, it does not generate enough income to meet its obligations. The partnership is either unwilling or unable to invest further equity in the project. There is no lender prepared to totally refinance the project apparently due to the fact that the property does not generate enough income to support a trust deed larger than the present first trust deed.

Springpark makes no allegations of fraud or bad faith on the part of Crown in either entering into or performing under the stipulated judgment. Springpark merely asks this court to exercise its equity powers to further restrain the foreclosure sale. It is important to remember that he who seeks equity must do equity.

Springpark had the opportunity to litigate its right to have the automatic stay continued during the hearings on Crown's previous complaint to lift the stay. Rather than fully litigate the issue Springpark chose to stipulate to the lifting of the stay on the condition that Springpark would have the right to sell or totally refinance before November 5, 1976. Springpark failed to uphold its part of the bargain and now seeks to repudiate the agreement.

To allow Springpark to accomplish this result would seriously question the very integrity of these Court Proceedings and would do violence to the Court's conscience.

Springpark has already had its day in court on the lifting of the stay and the stipulated judgment, freely entered into by Springpark, is the law of the case and is res judicata on the issue.

There has been no extraordinary change in value of the property since the August 12 stipulation. Springpark argues that since Lincoln Savings and Loan Association tentatively granted a loan (as evidenced by Debtors exhibit A) that this constitutes an extraordinary change in the value of the property. This claim is totally without merit.

Like so many other lenders, Lincoln has refused to go through with the loan. Springpark has been seeking refinancing since December 1974 and in 1976 contacted about 40 lending institutions. Springpark now says it does not have a firm commitment but hopes it will be able to accomplish its goal within three to four months. The latest almost-commitment is nothing new.

At the hearing on May 12, 1976 in this Court Mr. Dewing testified that he had a loan 99% committed and yet on May 4, 1976 he was sent a letter from that lending institution, Home Savings and Loan Association stating "We regret

that this transaction could not be consummated, but perhaps we may be of service to you at another time".

It is clear to this Court that if there has been a change in circumstances, it has been a change for the worse.

I find that Springpark is bound to its prior agreement, approved by this Court, lifting the automatic stay provided by Rule 12-43, and therefore the present stay is vacated.

IT IS SO ORDERED.

DATED: January 11, 1977.

/s/ BARRY RUSSELL
Bankruptcy Judge

APPENDIX (ii)b.

Opinion.

United States District Court Central District of California.

In the matter of Springpark Associates, a Limited Partnership, Debtor/Appellant. Crown Life Insurance Co., Plaintiff/Appellee, vs. Springpark Associates, a Limited Partnership, Defendant/Appellant. No. BK-76-16785-BR-LTL.

Filed: Dec. 20, 1977.

Springpark Associates here appeals from an order of the bankruptcy court dated January 11, 1977 lifting a stay previously imposed pursuant to Rule 12-43(a) of the Rules of Bankruptcy Procedure. Our jurisdiction to review the January 11 order rests on 11 U.S.C. §67(c). We affirm.

Springpark consists of a partnership with one asset, a 32-unit apartment complex. The complex was constructed in 1972, and a trust deed to secure a promissory note was taken by assignment by Crown Life Insurance Co. (''Crown''), the appellee here. After having fallen into arrears on taxes for the property, Springpark on February 11, 1976 filed its first Chapter XII petition with the avowed purpose of staying foreclosure proceedings which Crown had begun against the property. Crown filed an adversary complaint seeking to lift the stay and the parties commenced litigation.

Before a trial could be completed, Springpark represented that it could arrange refinancing which would enable it to pay its debts to Crown without a foreclosure sale. To accommodate such a procedure, the parties entered into a stipulation whereby Crown, among other things, would not oppose dismissal of the petition and would not sell the property before November 5, 1976. The bankruptcy court entered an order to that effect on August 12, 1976. The refinancing never materialized and, after granting Spring-

park several extensions of time within which to obtain it, Crown set December 30, 1976 as the final date for foreclosure sale.

Hours before the sale was to take place, Springpark filed a second Chapter XII petition, again invoking the provision of the Bankruptcy Rules that a petition stays other proceedings. The bankruptcy court after hearing held that the stipulated judgment entered August 12, 1976 bound the parties and operated as the law of the case. On January 11, 1977 it lifted the automatic stay and the property was sold. It is this order of January 11, 1977 which forms the basis for this appeal.

The central issue is the effect to be accorded the order of the court entered on August 12, 1976. Neither party has chosen to designate that order as a part of the record on appeal, though it is before us as an exhibit to another document which was designated. We do not consider the issue mooted by the sale of the property, as appellee urges, because remedies could be available should this Court conclude that the bankruptcy court erred in issuing its January 11, 1977 order.

The filing of a Chapter XII petition creates an automatic stay under Bankruptcy Rule 12-43(a):

> "A petition filed under Rule 12-6 or 12-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

The rule was enacted to bring the procedure under Chapter XII petitions into conformity with the procedure for petitions

filed under other Chapters of the Act. Thus, a Chapter XII petition stays such proceedings as a mortgage foreclosure, another bankruptcy proceeding, or an equity receivership. *See* Advisory Committee Notes to Bankruptcy Rule 12-43(a).

Appellant urges that the bankruptcy court erred in proceeding under Rule 12-43(e) to lift the stay imposed under Rule 12-43(a). It argues that there was no showing of irreparable harm and thus no justification for lifting the stay absent a full trial under Rule 12-43(d).

We do not read Rule 12-43(e) so narrowly. The rule provides that irreparable harm must be shown by affidavit or verified complaint before the bankruptcy court can lift a stay without notice to the adverse party. Here the adverse party was given notice and an opportunity to be heard. Furthermore, the bankruptcy court found that serious harm to the appellee was continuing, a finding which is not clearly erroneous and which we accept. Springpark cannot complain that it was deprived of the opportunity to contest the application to lift the stay.

Appellant further argues that two separate proceedings exist here, and one might take its argument further to mean that the second petition stayed the court's order of August 12, 1976. If that is the argument, we find it unpersuasive. The exact same parties and property are involved in both petitions, and it is clear that the proceeding was one to fix an arrangement or to allow the sale of the property. After a close look at the record, we can only conclude that there was but a single case in which appellant has sought to mislead the bankruptcy court and the adverse party by attempting to stay an order entered in that case. That there was but a single case is not changed by the filing of a second petition.

The bankruptcy court had wide discretion to approve or reject the stipulation of the parties, *A & A Sign Co. v. Maughan,* 419 F.2d 1152, 1155 (9th Cir. 1969) and that discretion was wisely exercised here. Once approved, the stipulation represented more than a mere agreement between the parties. It represented the order of the court. As such, it could be set aside in its entirety by the bankruptcy court if justice so required, *A & A Sign Co., supra,* but until so set aside or until modified by further court order it governed the actions of the parties.

The practical effect of the adoption of appellant's position is intolerable since under its approach an arrangement might never occur. A debtor could file a petition, thereby staying a foreclosure sale; obtain a stipulation and order dismissing the petition and allowing a sale to avoid judgment on a complaint seeking to lift the stay; then file another petition staying the sale and start the cycle again. The result would be two-fold: the outcome of the arrangement proceeding would be delayed unfairly and the use of stipulations would be discouraged. This Court will not sanction either result.

We note that, although the effect under Section 12-43(a) of filing a petition is to stay other proceedings, that is not the purpose of the petition. The purpose is to allow the debtor the opportunity to rearrange his affairs so that he can create his own plan for paying off his debts without losing the property. "The policy of Chapter XII," noted the First Circuit, "is rooted in society's interest in substituting arrangement for liquidation where possible. . . ." *In re Colonial Realty Investment Co.,* 516 F.2d 154, 160 (1st Cir. 1975). That policy was served here when the debtor filed its first petition. The debtor and creditor thereafter stipulated to a dismissal of the petition and an order setting a specific time when the property could be sold. The policy enunciated above under those circumstances cannot be taken to deprive

the creditor of the right to sell the property when the time for sale under a court order arrives.

Although we think the facts of this case would distinguish the holding of the Ninth Circuit that good faith in a Chapter XII proceeding may be considered only after a plan has been approved by creditors and the debtor requests confirmation, *Sumida v. Yumen,* 409 F.2d 654, 659 (9th Cir. 1969), whether the appellant acted in good faith in filing a second petition is not the real issue on appeal. The real question is whether the appellant may circumvent the August 12, 1976 order by the filing of a second petition. We conclude that the bankruptcy court was correct in holding that the order pursuant to stipulation filed August 12, 1976 governed the second petition, and that by the August 12 order the creditor was entitled to proceed with the foreclosure sale. We accordingly decline to consider the arguments of appellee that the automatic stay provision is unconstitutional on its face or as applied.

We note also that a notice of appeal from a March 23, 1977 order denying rehearing has been filed by appellant. The bankruptcy court lacked jurisdiction to enter such an order once an appeal of the January 11 order had been taken. *See In the Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 200-201 (9th Cir. 1977). That appeal is dismissed.

The January 11, 1977 order of the bankruptcy court is AFFIRMED.

The Clerk of this Court shall serve copies of the within Opinion by United States mail on counsel of record for the parties.

DATED: December 19, 1977.

/s/ LAWRENCE T. LYDICK
United States District Judge